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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

IN RE PORTFOLIO RECOVERY ASSOCIATES,) Case No. 3:11-md-02295-JAH-BGS
LLC TELEPHONE CONSUMER PROTECTION)
ACT LITIGATION) MEMORANDUM OF POINTS AND

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
MOTION TO STAY (DOC. NO. 777)**

THIS DOCUMENT RELATES TO ALL MEMBER
CASES

HON. JOHN A. HOUSTON

Portfolio Recovery Associates (“PRA”) asks this Court to stay this case (the “litigation”), involving approximately 300 plus opt out individual member cases remaining after the settlement of a class action against PRA, while the Supreme Court decides the issue of

“Whether the government-debt exception to the TCPA’s automated-call restriction violates the First Amendment, and whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.”

Am. Ass’n of Political Consultants, Inc. v. FCC, 923 F.3d 159 (4th Cir. 2019), cert. granted sub nom. *Barr v. Am. Ass’n of Political Consultants, Inc* (No. 19-631) (U.S. Jan. 10, 2020) (hereinafter, “AAPC”).

This court should not stay this case as, contrary to PRA’s assertion, the Supreme Court has agreed to consider only one clause of the TCPA, that clause applicable to government debt exemption “*unless such call is made solely to collect a debt owed to or guaranteed by the United States.*”

This is narrower than PRA’s assertion that if the Supreme Court finds the government debt exception “*is not severable from the TCPA’s restriction on automated telephone calls, all member case claims would necessarily fail.*” (Doc. No. 777-1; “MtStay P&A,” p. 1; ln. 22)

The premise underlying that conclusion is that this litigation involves government debt and that the Supreme Court must strike down the entire TCPA if the government debt exception is unconstitutional. This is more of speculation of what may happen than an argument.

First, the debts at issue in the Member Cases are not government debts and PRA makes no assertion they are government debts.

The second premise is that holding the government debt exception unconstitutional would render the entire statute unconstitutional. This does not necessarily follow. Thus, the conclusion that litigation concerning consumer debt that is not government debt should be stayed while the Supreme Court decides the

1 constitutionality of an exception for government debt is invalid.

2 Regardless, the only issue pending before this Court, before the cases are returned
3 to their district of origin, is relating to the nature of PRA's telephone dialing systems
4 (ATDS) in this case.

5 **Background**

6 PRA cites *Am. Ass'n of Political Consultants, Inc. v. FCC*, 923 F.3d 159, 167-68
7 (4th Cir. 2019); *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1156 (9th Cir. 2019), *petition*
8 *for cert. filed* (No. 19-511) (U.S. Oct. 17, 2019) (MtStay P&A at 2:24-28) in which the
9 exception was severed, damaging their argument for a stay and cites the framing of the
10 issue in Respondent's brief, seemingly disregarding the question before the Supreme
11 Court.

12 The statutory provision contains a clause excepting government debt. This clause
13 is irrelevant to the litigation, as no government debt is involved, and regardless of
14 whether or not it is severed, the relevant provisions of 47 U.S.C. § 227(b)(1)(A)(iii) that
15 deal with automated telephone dialing systems (emphasized in Defendant's Points &
16 Authorities in support of its Motion) (MtStay P&A, at 2:12-19) are not at issue in this
17 litigation. Indeed, the Court in ordering the parties file cross-motions for summary
18 judgment narrowly frames the issue in this litigation:

19 After the completion of the limited discovery... this Court will entertain a
20 motion(s) for summary judgment or summary adjudication on the issues relating
21 to the nature of *Defendant's telephone dialing systems*. (Emphasis added.) (Doc.
22 No. 597, ¶9)

22 **Argument**

23 **1. Legal Standard**

24 The plaintiffs agree with the legal standard presented by PRA. (MtStay P&A, p 3,
25 l. 11 -p 4, l. 14).

26 PRA cites *San Diego Padres Baseball P'ship v. United States*, No. 99-cv-0828,
27 2001 WL 710601, at *1 (S.D. Cal. May 10, 2001), which is inapposite, as there, unlike
28 in this litigation, the issue before the district court was indistinguishable from the issue

1 pending in the 9th Circuit appeal:

2 Neither party disputes that the payment classification issue in *San Francisco*
 3 *Baseball* is indistinguishable from the instant case. As such, the Ninth Circuit's
 4 decision in *San Francisco Baseball* will substantially simplify the issues presented
 5 here. At minimum, the Ninth Circuit's *San Francisco Baseball* decision will
 6 resolve the primary, if not only, disputed issue that remains in this case.

7 PRA's cite to *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458,
 8 1465 (9th Cir. 1983) is inapplicable as no appeal or another court was involved and that
 9 court stayed one issue in the case while arbitration on another issue was resolved.

10 [a] trial court may, with propriety, find it is efficient for its own docket and the
 11 fairest course for the parties to enter a stay of an action before it, pending
 12 resolution of independent proceedings which bear upon the case.

13 *Mediterranean* at 1465 (9th Cir. 1983)

14 **The Three Factors**

15 **A. Judicial Economy.**

16 PRA argues that a stay will conserve judicial and the party's resources. This is
 17 inaccurate. The present posture of the litigation is that the parties are awaiting the
 18 court's decision on cross-motions for summary judgment on "... issues relating to the
 19 nature of Defendant's telephone dialing systems" (Doc. No. 597, ¶9), not government
 20 debt exemption. Discovery has been concluded, briefs drafted and filed, and the briefing
 21 schedule concluded. Nothing further remains for the parties to do but await this Court's
 22 ruling.

23 Nonetheless, if *arguendo*, the Supreme Court concluded the TCPA was, as a
 24 whole, unconstitutional, many of the member cases have other counts for other causes of
 25 action and, contrary to PRA's assertion, (MtStay P&A, at 5:3-5), regardless of the
 26 Supreme Court's decision, many of the 200 cases will still have issues unresolved as
 27 they are not all solely TCPA counts.

28 Neither will a stay promote judicial efficiency, as the parties are merely awaiting
 the Court's decision nor will it have any effect on the subsequent inevitable litigation of

1 the other non-TCPA counts.

2 *Krejci v. Cavalry Portfolio Servs., LLC*, No. 3:16-cv-0211, 2018 WL 3533246, at
3 *1 (S.D. Cal. July 23, 2018) is inapplicable as it involved staying one district court case
4 to wait for the decision on cross-motions for summary judgment in another case
5 involving the same defendant and judge.

6 Similar to *Mediterranean, Leyva v Certified Grocers of California, Ltd.*, 593 F.2d
7 857 (9th Cir. 1979) is also inapplicable. (Staying discovery in contract claims while
8 arbitration was pending.) The arbitration proceeding was not independent of the rest of
9 the case.

10 *Mackiewicz v. Nationstar Mortgage LLC*, No. 15-cv-465, 2015 WL 11983233
11 (M.D. Fla. Nov. 10, 2015) and *Hanover Ins. Co. v. Mason McDuffie Real Estate, Inc.*,
12 No. 16-cv-01114, 2016 WL 7230868 (N.D. Cal. Dec. 14, 2016) are cases that had
13 pending incomplete litigation, again in contrast to this litigation. It was self-evident from
14 the procedural posture that staying those cases would conserve judicial resources. In
15 *Mackiewicz*, a stay would assist the Court in simplifying and clarifying the law to be
16 applied and issues to be decided. *Hanover* was a declaratory judgment action seeking a
17 ruling that there is no duty to defend or indemnify. Denial of motion to stay, by the
18 carrier, would force the defendant to fight a two-front war against Plaintiff and against
19 its own insured, and therefore a stay was granted. Like *Mediterranean* and *Leyva*, one
20 part of a case was stayed while a second part, which could be dispositive of some issues
21 in the first part, proceeded. Again, a saving of judicial resources.

22 Finally, the question before the Supreme Court is whether the government debt
23 exception is unconstitutional and, if so, how that should be resolved, not about
24 adjudication on the issues relating to the nature of PRA's telephone dialing systems.

25 **B. PRA faces no hardship.**

26 PRA argues there is a risk that it will face inconsistent rulings absent a stay. This
27 belies the possibilities that:

- 28 1. The Supreme Court finds no First Amendment infirmity and lets the

1 government debt exception stand.

2 2. The Supreme Court finds in favor and severs that exception.

3 3. The Supreme Court finds the entire statute unconstitutional.

4 In any of the three possibilities, PRA will not be required to spend any additional
5 time.

6 PRA cites numerous cases for its assertion that a stay will limit resources to be
7 expended in future litigation in this case of the ATDS issue. But there is no future
8 litigation regarding the ATDS issue that will require PRA to expend resources. None of
9 these cases involved the posture of this litigation, where the parties were simply waiting
10 for a ruling on the dispositive motion.

11 *Rodriguez v. CleanSource, Inc.*, No. 14-cv-789, 2015 WL 12434307, at *3 (S.D.
12 Cal. Feb. 26, 2015) (parties agree that issues appealed have direct impact on issues in
13 present case “moving forward without awaiting the Supreme Court ruling ... would
14 result in significant expenditures of time and resources ... to litigate issues that may
15 ultimately be invalidated.)

16 *Meza v. Sirius XM Radio, LLC*, No 17-cv-2252-AJB-JMA, 2018 WL 4599718
17 (S.D. Cal. Sept 25, 2018) is closest to the issues in *AAPC*. However, unlike in this
18 litigation, where nothing is left but the ruling on the dispositive motions, no litigation
19 had occurred other than the complaint and numerous PHV motions. The motion to stay
20 was filed immediately with Defendant’s initial responsive pleadings. Clearly, the stay
21 acted to conserve judicial and party resources. *Prasad v. Santa Clara Cnty. Dept. of Soc.*
22 *Servs.*, No. 15-cv-04933-BLF, 2016 WL 1734066 (N.D. Cal. May 2, 2016) (the court
23 partially granted a stay as the 9th Circuit appeal concerned the overlap between two cases
24 – *Prasad* and *Prasad I* – and therefore avoided duplicative discovery); *Karoun Dairies,*
25 *Inc. v Karlacti, Inc.*, No. 08-cv-1521, 2013 WL 4716202 (S.D. Cal. Sept. 3, 2013) (No
26 other case was involved. Stay pending appeal considering the validity of an oral contract
27 also at issue in that case)

28 Regardless of whether the TCPA is found wholly unconstitutional, or the

1 government debt is severed, further briefing will be unnecessary in this litigation on the
2 ADTS issue as the dispositive cross-motions for summary judgment are pending.

3 A stay will not “save the parties from the need to invest resources to prepare for
4 trial or additional discovery.” *Nationstar Mortg., LLC v. Ram LLC*, No. 2:15-CV-
5 01776, 2017 WL 1752933, at *1 (D. Nev. May 4, 2017).

6 *Reynolds v. County of San Diego*, No. 11-cv-1256, 2017 WL 3582953 (S.D. Cal.
7 Aug. 18, 2017) was a juvenile dependency action that involved constitutional questions
8 regarding violations of Plaintiff’s individual rights. The motion for stay arose from an
9 interlocutory appeal of a finding regarding qualified immunity in the §1983 action and
10 another appeal in another similar case against the same defendant, whether medical
11 exams of minors without parental consent violate the individual’s constitutional rights.

12 It did not, as *AAPC*, involve the constitutionality of a statute. *Reynolds* is not
13 availing of the issues in PRA’s motion.

14 PRA is requesting an indefinite stay. Notably, the Court in *Reynolds* disapproved
15 of indefinite stays:

16 The Ninth Circuit has held that even a stay that terminates “upon the
17 ‘resolution of [an] appeal’ ” has an indefinite term... Thus, a district
18 court should give due weight to the requested length of a stay in
19 exercising its discretionary power to stay proceedings. *See id.*
(*Internal citations omitted*).

20 *Reynolds* at *5.

21 Finally, there is no threat of inconsistent rulings. This court’s ruling is not as
22 broad and merely determines whether an ATDS was used, not whether the TCPA is
23 constitutional.

24 PRA can show no prejudice by allowing this Court to come to a decision on the
25 pending cross-motions for summary judgment.

26 **C. The plaintiffs will suffer harm.**

27 A stay will also halt the inevitable return of the 300 plus individual opt-out cases
28 to their respective districts for resolution of the remaining causes of action contained in

1 many of those cases. Those cases have been pending for years and the Plaintiffs deserve
 2 a right to have their claims decided. Once this Court rules on the motions for summary
 3 judgment (applying *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018))
 4 the cases can be returned to their respective district courts. If the Supreme Court
 5 subsequently issues a ruling that could affect the TCPA claims, PRA can raise that issue
 6 in the respective districts courts of origin.

7 **Conclusion**

8 The question before the Supreme Court is different from that pending in this
 9 Court.

10 Whereas the Supreme Court will decide the constitutionality of the government
 11 debt exception, the present case will determine whether PRA used an ATDS and nothing
 12 more. The request of a stay is based on the erroneous and over-broad basis that the
 13 underlying statute may be found unconstitutional, and thereby void. This
 14 mischaracterizes the question before the Supreme Court. The question before the
 15 Supreme Court is narrowly framed to the constitutionality of the government debt
 16 exception.

17 Finally, the three factors do not exist. There is no further pending litigation that a
 18 stay would avoid, PRA suffers no prejudice if the Court (decides) the dispositive motion
 19 on its own schedule rather than the Supreme Court's schedule, and Plaintiffs will be
 20 prejudiced by the delay in further proceedings in their originating jurisdiction on the
 21 causes of action remaining after the ATDS issue is resolved. Therefore, the Plaintiffs
 22 request that PRA's motion be denied.

23
 24 Dated February 13, 2020

Law Office of Chris R. Miltenberger, PLLC

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 28

1 Dated February 13, 2020

Lester & Associates

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Re: In Re Portfolio Recovery Associates, LLC, TCPA Litigation
Case No. 3:11-md-02295-JAH-BGS
United States District Court, Southern District of California

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

On the date below, I electronically filed with the Court through its CM/ECF program and served through the same program the following

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
DEFENDANT'S MOTION TO STAY (DOC. NO. 777)**

on the interested parties in said case as follows:

☒ BY MAIL, by placing a copy thereof in a separate envelope for each addressee named below with the postage thereon fully prepaid, deposited each in the United States mail at St. Louis, Missouri in accordance with our business' practice.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated February 13, 2020

Lester & Associates

By: 
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